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No. 269

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1926

FORT SMITH LIGHT & TRACTION COMPANY,
Plaintiff in Error,

vs.

BOARD OF IMPROVEMENT OF PAVING DISTRICT NO. 16 OF THE CITY OF FORT SMITH, ARKANSAS,

Defendant in Error

STATEMENT AND BRIEF OF THE DEFENDANT IN ERROR

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CALVERT-McBRIDE PRINTING CO., FT. SMITH, ARK.

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STATEMENT

This case turns in a narrower compass than the brief of counsel for Plaintiff in Error indicates.

The Defendant in Error, Paving District No. 16, of the City of Fort Smith, Arkansas, is an improvement district, and a quasi-public corporation organized and existing under the laws of the State relative to improvement districts in cities and towns (R. p. 1, R. p. 5).

Paving District No. 16 was formed for the purpose of paving certain streets and avenues in the city of Fort Smith, including certain streets and avenues upon and along which the Plaintiff in Error, the Fort Smith Light & Traction Company, owns and operates a street railway. The Fort Smith Light & Traction Company is an Arkansas corporation, with its principal place of business in Fort Smith (R. p. 1, R. p. 5).

Act No. 680 of the Acts of the General Assembly of the State of Arkansas for the year 1923 requires the Fort Smith Light & Traction Company, whenever the balance of a street is paved by an improvement district, to pave that portion of said street lying between the rails and to the end of the ties occupied by its street railway tracks, with the same general character of pavement called for by the plans of such improvement district. The Act requires that notice and demand be made by the improvement district upon the Fort Smith Light & Traction Company to do such work, and upon its failure to comply the improvement district is authorized to do the work and to recover the amount so expended, with interest, in an ordinary action at law. This Act is set out in full in brief of Plaintiff in Error, pages 7-10; also R. pp. 24-26.

The Act contains some general language, but in fact applies only to the Fort Smith Light & Traction Company. There was no other to whom it could apply. This is stressed by Plaintiff in Error.

Paving District No. 16 formed plans for the paving of the streets to be paved by said district, and duly gave the notice and made the demand upon the Plaintiff in Error called for by said Act. The Plaintiff in Error refused to pave between the rails and to the end of the ties, and thereupon Paving District No. 16 did this work and brought suit to recover the amount expended by it in paving that portion of such streets lying between the rails and to the end of the ties of the tracks owned and operated by Plaintiff in Error, and recovered judgment for same. This judgment was affirmed by the Supreme Court of Arkansas.

In its answer the Plaintiff in Error alleges that in 1919 it had surrendered its franchise granted by the City of

Fort Smith, and had taken out in lieu thereof an Indeterminate Permit, issued by the State Corporation Commission under the provisions of Act No. 571 of the Acts of 1919, and had retained said Indeterminate Permit under the authority contained in Act 128 of the Acts of 1921, and that Act 680 of the Acts of 1923 was void as impairing the obligation of the contract alleged to exist by reason of said Act 571 of the Acts of 1919 and Act 128 of the Acts of 1921. Section 10 of Article I of the Constitution of the United States was specifically invoked.

Act 680 was also alleged to be void and in conflict with the Fourteenth Amendment to the Constitution of the United States, because it deprived Plaintiff in Error of its property without due process of law and denied it the equal protection of the laws.

Article XII, Section 6, of the Constitution of Arkansas, adopted in 1874, reads as follows:

> "Corporations may be formed under general laws, which laws may, from time to time, be altered or repealed. The General Assembly shall have the power to alter, revoke or annul any charter of incorporation now existing and revocable at the adoption of this Constitution, or any that may hereafter be created, whenever, in their opinion, it may be injurious to the citizens of this State, in such manner, however, that no injustice shall be done to the corporators."

In affirming the judgment of the trial court, the Supreme Court of Arkansas held that Act 680 was a valid exercise of this reserved power, and that, therefore, the Act contravened neither Section 10, Article I, nor the Fourteenth Amendment to the Constitution of the United States. The opinion of this Court in Fair Haven & Westville Rd. Co. vs. City of New Haven, 203 U. S., 379, was cited and relied on (R. p. 44).

Fort Smith Light & Traction Company vs. Board of Improvement Paving District No. 16, 103 Ark., 690.

ARGUMENT

IMPAIRMENT OF THE OBLIGATION OF CONTRACT

A Connecticut Act, passed in 1895, which had for its object the same purpose as the Arkansas Act now attacked, was sustained by the Supreme Court of Connecticut in Fair Haven & W. Rd. Co. vs. New Haven, 75 Conn., 442. The decision of the Supreme Court of Connecticut was affirmed by this Court in Fair Haven & W. Rd. Co. vs. City of New Haven, 203 U. S., 379.

In the Connecticut case it was contended, just as it is in this case, that the statute was repugnant to the contract clause of the Constitution of the United States and the Fourteenth Amendment.

The Supreme Court of Connecticut sustained the Connecticut Act, first, as a valid exercise of the police power, and, second, as a valid exercise of the right expressly reserved by the State of Connecticut to amend, alter or repeal a corporation's charter.

When the case reached this Court it refused to decide the question of the validity of the Connecticut Act under the police power, but sustained the State Court's decision in holding that the Act was a valid exercise of the power reserved by the State of Connecticut to amend or alter the charter of corporations.

Counsel attempt to distinguish that case from the one at bar by first calling attention to the fact that the Supreme Court of Connecticut, in part, predicated its decision on the police power. They wholly ignore the fact

that this Court planted itself squarely upon the proposition that the Connecticut Act was justified under the reserve power of the State to amend or alter a corporation's charter.

Counsel further seek to avoid the effect of that decision by arguing that the right to require a street railway company to pave between its rails, when the balance of the street is paved, can only be sustained under the taxing power, in those states where the local constitution and statutes permit such an assessment for a local improvement.

Durham Public Service Company vs. Durham, 261 U. S., 149, is cited, but an examination of that case shows that, in part at least, this Court based its decision in that case upon the reserve power.

Mr. Justice McReynolds said:

> "Counsel concede that the Constitution of North Carolina reserves to the Legislature power to alter or repeal corporate charters * * *" and

Fair Haven & W. Rd. Co. vs. New Haven, supra, as well as Sioux City Street Railway Company vs. Sioux City, 138 U. S., 98, were cited with approval.

Because counsel try to distinguish the Connecticut case, we feel it necessary to quote from the opinion of the Supreme Court of Connecticut, and from the opinion of this Court, as these quotations will show better than any argument we can make that the distinctions which counsel seek to draw are not well founded.

That the Supreme Court of Connecticut did not regard the Connecticut Act of 1895 as an assessment imposed upon the street railway company for a local improvement to be sustained, if at all, under the taxing power, is quite

apparent from the language used in the opinion. The Supreme Court of Connecticut said:

> "Do these terms as used in the Act of 1899 include the charge which the city was by the Act of 1895 authorized to make against and collect of the railway company? Whether we look at the natural meaning of the language employed, or interpret it in the light of all the provisions of the Act, the conclusion arises that this section, in common with the balance of the Act, exclusive of its last section, professing as it does to treat exclusively of assessments of benefits and damages upon property, and in the second section defining the benefits and damages as those accruing to owners of property abutting the street, makes no attempt to deal with the burden to be borne by the corporations enjoying a public franchise in the street and operating a portion of their respective systems over its surface. It treats of benefits from the improvement as incident to the ownership of adjoining land specially benefited. The charge to be made aganst the railway companies is regarded as having quite another foundation and character."

And again:

> "The Act of 1925 was careful to distinguish between the burden to be imposed upon the railway companies and that to be placed upon abutting landowners. The two classes of burdens were imposed by distinct provisions, and later described by apt distinguishing language. The Act of 1899, so far as its language goes, deals only with assessments of benefits and damages. Section 2, which prescribed the scope of the Act, not only confines its application to such assessments, but also qualifies the assessments as assessments to be made for or against all owners of property, abutting upon or adjoining the streets. * * *"

> "We are bound to assume that the Legislature used

its language intelligently, and it is fair to assume that the use was in the ordinary and commonly accepted sense, and to conclude that when it spoke of assessments of benefits upon abutting property owners, it did not intend to embrace within the description parties who were not the owners of land near the improvement, and whose property was limited to the rails, ties, poles, wires, etc., which lie in or extend along or over the highway."

And again:

"Plaintiff's counsel discuss the question chiefly as one involving the assessment of benefits by reason of public improvements. We need not stop to inquire whether the objection in this form is one which would be well taken, since it is quite evident, as we have already had occasion to observe, that the legislation in question did not regard the charge to be imposed upon the plaintiff as one of that character, and since constitutional justification for the legislative attempt to impose upon the plaintiff the burden of a definite portion of the cost of the highway improvement can be otherwise so easily found."

It will be seen from the above that the Supreme Court of Connecticut expressly negatived the idea that it sustained that portion of the Act which imposed a duty on the Street Railway Company as an assessment of benefits for a local improvement.

It did sustain the Act under the police power, but inasmuch as this Court did not place its affirmance on that ground, we turn to the language of the Supreme Court of Connecticut upholding the legislation under the reserve power to amend, alter, or repeal the charter of a corporation. In this connection the Supreme Court of Connecticut said:

"Again, the plaintiff is a quasi-public corporation,

> having a franchise from the State to operate a street railway in the streets in question, among others."

This is exactly what Plaintiff in Error contends that it now has under its indeterminate permit.

The Supreme Court of Connecticut proceeded:

> "And aside from the powers impliedly reserved as incidents of the so-called police power, the State has *expressly* reserved to itself the power to amend, alter, or repeal the plaintiff's charter. This power of amendment is, of course, not an unlimited one. What its limits are it is perhaps impossible to precisely define; but it is clear that the power extends so far as to authorize legislation imposing reasonable regulations and requirements upon a corporation operating a railway in a public street; * * * the condition of repair in which the street shall be kept, the improvements which shall be made therein for the convenience of public travel, and the share of any burden incident thereto which shall be borne by the corporation."

In another portion of its opinion the Supreme Court of Connecticut said:

> "In this case the legislation and the action under it called for the not unusual proceeding of paving a city street with asphalt. It cast a portion of the attendant burden upon abutting property owners, and another portion upon the corporation which enjoyed the exclusive public franchise of operating a street railway in the streets to be paved. The extent of the latter burden was limited to the *actual cost* of the pavement laid upon that portion of the street which was peculiarly appropriated to the special use of this corporation. Here is no such apparent injustice as to warrant us in saying that constitutional powers have been transgressed."

When the case reached this Court it pointed out that

the State Court had adjudged the Act constitutional on the ground that it was a proper exercise of the police power of the State, and on the further ground that the Act was an exercise of the power expressly reserved by the State of altering or amending the charter of the Street Railway Company. This Court then stated that it would place its decision on the second ground, as of more local nature, and because exercise of the power expressed only came under its review in its excesses.

Mr. Justice McKenna said:

> "We accept the decision of the Supreme Court of errors, that the statutes were intended as an exercise of the power of amendment reserved by the State, although plaintiff in error contends that such was not their intention."

And again:

> "Was such an amendment in excess of the power of the State?"

Then, after pointing out that the limitation upon the power of amendment of charters of corporations had been defined by this Court several times, and after reviewing certain of these cases and quoting from one of them, the Court further said:

> "In the light of these cases let us examine what the statutes of Connecticut require of plaintiff in error. By its original charter (1862) plaintiff in error was required to keep the street between its tracks, with a space of two feet on each side of the tracks, in good and sufficient repair. In the amendment of the charter in 1864 this obligation was retained, and also in the public Acts of 1893. In the Act of 1895 the duty of paving and repaving was imposed on all railway companies. We shall assume, for the purpose of our

discussion, that the duty to repair did not include the duty to pave and repave, although much can be said and cases can be cited against the assumption. Does the change and increase of burden upon the plaintiff in error come within the limitations upon the reserved power of the state? Has it no proper relation to the objects of the grant to the company or any of the public rights of the state? Can it be said to be exercised in mere oppression and wrong? All of these questions must be answered in the negative. The company was given the right to occupy the streets. It exercised this right first with a single track, and afterwards with a double track. Before granting this right the state certainly could have, and reasonably could have, put upon the company the duty of paving as well as of repairing. Such requirement would have been consistent with the object of the grant. It is yet consistent with the object of the grant. It is not imposed in sheer oppression and wrong, and the good faith of the state cannot be questioned. It is imposed in the exercise of one of the public rights of the state—the establishment, maintenance and care of its highways. The extent of this right is illustrated by West Chicago Street R. Co. vs. Illinois, 201 U. S. 506, 50 L. Ed. 845, 26 Sup. Ct. Rep. 518, and cases cited."

THE FOURTEENTH AMENDMENT

All that has been said under the preceding heading applies with equal force to the contention that the Act is repugnant to the Fourteenth Amendment. In both the Fair Haven case and the Durham case, the Act was attacked under the contract clause and under the Fourteenth Amendment.

In the Durham case the principal contention was based upon the Fourteenth Amendment, and it was urged there, as it is urged here, that the street railway company was losing money.

This is not a rate case. Under the original franchise granted to this company by the City of Fort Smith the duty was imposed upon it to pave between its tracks. That same franchise imposed upon it the duty of carrying passengers at not exceeding five cents. If, while this franchise existed, the Legislature had imposed upon the railway company the duty of paving, not only between its tracks, but to the end of its ties, or further, it might have contended with some plausibility that the Act was imposed in "sheer oppression and wrong." The argument could have been made that the provision of the franchise which required it to carry passengers at five cents was contractual in its nature; that it was not making money at five cents; that it was bound by its franchise to carry passengers at five cents, and that the Act of the Legislature in imposing an additional burden of paving would add further to the loss which it could not escape.

But, as pointed out by counsel, Plaintiff in Error surrendered its franchise and took out an indeterminate permit, by which and under which it was relieved of its contractual franchise rates and became subject to rate regulation.

If it is losing money under the rates which it is now charging, it can apply to the proper regulatory body for relief, and if relief is denied it there it can apply to the Courts, both State and National.

In Woodhaven Gas Light Co., N. Y. Ex Rel. vs. Public Service Com., 269 U. S., 244, an order of the Public Service Commission which directed the gas company to extend its mains to furnish gas to the residents of five communities, was attacked on the ground that it confiscated the company's property, was arbitrary and capricious, and therefore repugnant to the due process clause of the

Fourteenth Amendment. It was urged that the company was losing money even with its existing plant and that the order requiring it to extend its service into thinly settled communities would aggravate this loss.

Mr. Justice Butler said:

> "This case is to be distinguished from a suit to restrain the enforcement of legislation prescribing a confiscatory rate. Here the rate is not involved. The order directs the extension; it does not deal with compensation. The Commission reasonably might assume that the company will take appropriate steps to save its property from confiscation."

In the instant case it is to be assumed that if the rates which the company has been charging are not sufficient to insure a reasonable return upon the value of its property devoted to the public service, including the slight additional expense rightly imposed by the State through the present Act, then this Company will promptly take appropriate steps to save its property from confiscation, as it has the undoubted right to do.

Indeed, the argument is made by counsel that the effect of the Act in question is simply to shift to the traveling public, who use its street cars, the burden which otherwise would be imposed entirely upon the adjacent property owners who own land along the streets improved, and it is further argued that this is unjust and improper. It is as true now as it was in 1906, when the Fair Haven case was decided, and as it was in 1923, when the Durham case was decided, that the street railway company and its traveling public practically occupy to the exclusion of others that portion of the streets upon which it lays its tracks.

This record reflects the fact that the cost incident to

paving in and around street railway tracks is higher than on the balance of the street (R. p. 35), and that the cost of maintenance is decidedy higher (R. pp. 34, 35).

The record further discloses that in the instant case the improvement was made at a minimum cost to the street railway company (R. pp. 34-36).

Legislation which, in the form of automobile and gasoline taxes, shifts to the traveling public all or a portion of the cost of constructing and maintaining all rural highways, is now in force in most of the States of the Union. The validity of such legislation has been sustained by the Supreme Court of Arkansas in Standard Oil vs. Brodie, 153 Ark., 114, and the same statute was upheld by this Court in Pierce Oil Corp. vs. Hopkins, 264 U. S., 137.

That the practice of imposing all of the burden of improving highways upon the adjacent landowners, as had long been the custom in Arkansas, can be the subject of abuse and oppression, and has called for remedial legislation putting a part of the burden upon the traveling public, has been commented upon at length by the Court of Appeals for the Eighth Circuit in the case of Guardian Savings & Trust Company, Trustee, vs. Dillard, reported in the Federal Reporter Advance Opinions of January 20, 1927, Vol. 15 (2nd), No. 7, page 996.

Ordinarily, of course, the distribution of the burden is one of legislative determination. It is only its abuses which can be questioned here.

THE INDIANA CASE

Plaintiff in Error presses upon this Court the decision of the Supreme Court of Indiana, in the case of Greensburg Water Co. vs. Lewis, 128 N. E. R p., 103. The facts dealt with in that case are not even analagous to the facts

in the case at bar. In that case a statute attempted to impose upon a water company the duty of furnishing drinking water, free of charge, for all public schools, churches and public buildings, and to furnish fire hydrants at less than compensatory rates. The statute of Indiana in terms attempted to require the water company to give away a portion of its property merely because the company had at one time been under contractual obligation to do so. There was no attempt to justify this legislation under the reserve power to change, alter or amend the charter of the corporation. It does not appear from the opinion whether the State of Indiana had reserved the power by its constitution or statutes to amend the charter of a corporation. Even if it had done so, legislation requiring a corporation to give away its property to others might well have been characterized as an unconstitutional taking of property, "imposed in sheer oppression and wrong." The decisions of this Court are clear cut that whatever the precise limitations are to the reserve power, one of the limitations is that you cannot take the company's property and give it to another.

There is no similarity even, between legislation which takes away a company's property and gives it to another, and legislation which under the reserve power imposes the duty upon a street railway company of paving the actual portion of a street almost exclusively occupied by it.

As was said by Mr. Justice McKenna in the Fair Haven case, the last character of legislation "is not imposed in sheer oppression and wrong and the good faith of the State cannot be questioned. It is imposed in the exercise of one of the public rights of the State—the establishment, maintenance and care of its highways."

And, as was said by Mr. Justice McReynolds in the Durham case:

"There are obvious reasons for imposing peculiar obligations upon a railway, in respect of streets occupied by its tracks."

THE ACTS OF 1919 AND 1921

The right of the State to amend the charter of a corporation was expressly reserved by the State Constitution.

We assume that the Legislature by mere statute could enter into a contract which, for the time being and as to some particular subject, would waive this right so reserved by the State in its Constitution. We assume that the Legislature by statute might enter into a contract with a street railway company, or companies, by which it expressly waived the right of the State to exercise the reserve power in requiring paving of tracks. But when the utility claims that such agreement exists it must point to clear cut language which waives the State's right, and it must further show that the language used was contractual.

We do not question that when the Legislature by Act 571 of the Acts of 1919 authorized a utility to surrender its local municipal franchise and to take out in lieu thereof an Indeterminate Permit, that such an Indeterminate Permit so taken out constituted a contract between the utility and the State, the terms of which are to be found in the Act of 1919.

That contract did say to all utilities who accepted its terms, including the Plaintiff in Error, your rates are now subject to regulation to the end that you may obtain a fair return and no more, and you are relieved of the onerous burden of five cent fares for adults and two and one-half cents for children (R. p. 29).

Camden vs. Ark. Light & Power Co., 145 Ark., 205.

But there is absolutely no language in the Indeterminate Permit itself (R. p. 9), nor in the language of the Act of 1919, which authorized it, by which the State agrees that it will not exercise its reserved right to amend the charter of a street railway company by requiring it to pave its tracks.

The only sections of the Act of 1919 relied on by counsel are sections 14 to 16, inclusive, printed in their brief at pages 80-81 as appendixes E, F, and G. We fail to find any language in these three sections, or any other section of Act 571 of 1919, which can be construed as a covenant or agreement on behalf of the State not to require the Plaintiff in Error to pave between its tracks. Counsel have pointed to none.

In Durham Public Service Co. vs. Durham, supra, this Court said:

> "The Court below held that while the contract imposes no liability for paving, neither does it grant exemption therefrom. And we agree with their conclusion. Such exemptions must plainly appear. The general rule is that doubts as to provisions in regard to them must be resolved in favor of the municipality or State. Cleveland Electric R. Co. vs. Cleveland, 204 U. S. 116."

We agree that the Indeterminate Permit issued to Plaintiff in Error on August 15, 1919 (R. p. 9) and which recites in its face that it is issued "under the terms of Act 571 of the Acts of 1919," and is line of local franchises surrendered, constituted a contract between this utility and the State, and that the terms of that contract are to be found in said Act 571 of 1919. We have pointed out that there is no language in that act by

which the State covenants not to exercise powers, or by which it waives its sovereign power in that respect.

We do not agree that Section 55 of the Act of 1923 created any contract whatsoever between this utility and the State. This section is set out on page 81 of the brief of Plaintiff in Error.

It is not contended that the Indeterminate Permit which constitutes the contract between the State and the utility was issued pursuant to Act 138 of the Acts of 1923. It could not be so contended. Section 55 of the Act of 1923 expressly repealed Sections 54, 55 of the Act of 1913, which authorized the granting of indeterminate permits (Appendix A this brief). One of the very purposes of the Act of 1923 was to prohibit the issuing of any further indeterminate permit by the State.

Section 55 of the Act of 1923 simply said to utilities: If you elect to do so, you may terminate your old local franchises if you make application to do so in ninety days. If you do not make such application then you can continue to operate under the Indeterminate Permit heretofore issued you pursuant to Act 675 of the Acts of 1913. The Plaintiff in Error made no application for a termination of its old local franchise. It did nothing. It seems impossible to me to make a new contract, or the modification of an existing contract out of such non action. At most it was an offer to create a contract and a statement of the policy of the State if the offer of consolation was not accepted.

Counsel assert that the Indeterminate Permit granted it in 1913, and the Act of 1913, under which it was granted, constituted a contract with the State based upon an adequate consideration, to wit: the surrender by the utility of its local franchises. If so, this contract

evidenced by such Indeterminate Permit could not be cancelled or rescinded without the State's consent. By the Act of 1921 the State offered to rescind and this utility refused. It is contended that the general language used in the last few lines of Section 15 of the Act of 1921 should be construed as a promise to treat all utilities not reinstating their franchises alike. If so, it was a mere declaration of policy subject to change. There was no consideration for it moving from the utility. The utility was bound by the Act of 1919 and the Indeterminate Permit issued under same. The State by Section 15, offered a release from the Indeterminate Permit and a reinstatement of the old franchises, this utility failed to accept. It did nothing.

In addition, it is difficult to believe that by the Act of 1921 the State intended to give to holders of indeterminate permits any thing more than they then had. The whole object of the act was to prohibit any more indeterminate permits and to encourage the surrender of those which existed.

THE FACTS

The trial court found that the expenditure made by this Paving District was justified and necessary under the facts; that the condition of the pavement between the rails and to the end of the ties of the tracks of the Plaintiff in Error on the three streets, was such that it was necessary and proper for the plaintiff to do the work and to expend the money that it did (R. p. 20).

The Supreme Court of Arkansas in affirming the judgment said:

> "It appears that the work was done in an economical manner. The old foundation between the tracks on Garrison Avenue was utilized. There is evidence

tending to show that the condition of the pavement between the tracks needed rebuilding. The evidence is sufficient to support the findings of the (trial) Court." (R. p. 45.)

The undisputed evidence is to the effect that the old pavement on the one block on North 5th Street was in hopeless shape both between the rails and on the balance of the street. No complaint under the facts is made as to this block. The cost of repaving this block between the rails and to the end of the ties was $789.96 (R. 36). What has been said above is equally true of the one block on North 3rd Street. The cost of repaving this block between the rails and to the end of the ties was $676.61 (R. p. 36).

The only other street on which Paving District No. 16 laid paving on which the Fort Smith Light & Traction Company had street car tracks was Garrison Avenue. Garrison Avenue is the principal business street in Fort Smith (R. 38).

In 1912 Garrison Avenue was paved by Paving District No. 7. That district laid a wood block pavement. At the time this wood block pavement was laid and pursuant to its local franchise obligation then in effect, Plaintiff in Error paved between its rails with brick and paid Paving District No. 7 for that part of the wood block pavement (18 inches) from the rails to the end of the ties. The cost of this to Plaintiff in Error was $50,000.00, including the concrete base and the amount paid Paving District No. 7 (R. p. 30).

The present district had nothing to do with the laying of the old wooden blocks pavement (R. p. 35). The testimony on behalf of the Defendant in Error was that the paving between the rails laid by the Traction Com-

pany in 1912 was in very bad shape when the present paving was started, and that work done by the Traction Company on its tracks at the time the present paving was started absolutely necessitated relaying the brick between the rails. The further proof was that the brick between the rails was laid on edge in 1912 in such a way that it stuck up higher than the rails with the result that automobiles received a rough jar in crossing over the tracks at street intersections (R. p. 34).

Paving District No. 16 did not discard the brick laid by the Plaintiff in Error in 1912. It simply took them up and cleaned them and relaid them flat with an asphalt filler at a cost of eighty cents a square yard, or a total cost of $6,381.61. The wood block pavement on the balance of the street, that is from curbing to street car rail was taken up and that portion of the street was repaved with new brick with an asphalt filler at a cost of $2.19 a square yard. The 18 inch strip from car rail to end of ties was charged to Plaintiff in Error at this price or just what it cost. This amounted to $3,424.72 (R. p. 35-36).

It was in evidence that the cost of repairing the pavement between the rails in the manner suggested by the witnesses for the Traction Company would have cost more than the method followed by the District (R. p. 33). What the District really did was to repair the pavement between the rails. Compare the cost to the Traction Company in 1912 of laying new pavement of $50,000.00 with the $6,381.68 in 1923, plus the $3,424.72 for new brick pavement outside the rails to the end of the ties to replace the wood block pavement (R. p. 37).

There is nothing in the statute of 1923, attacked in this case, nor in the action of this Paving District under

the statute, which would justify the argument that Plaintiff in Error has been subjected to "mere oppression and wrong."

Respectfully submitted,

JOHN P. WOODS,
HARRY P. DAILY,
Attorneys for Defendant in Error.

APPENDIX A

Section 25, of Act 124 of 1921.

Section 25. That sections 13, 14, 15, 20, 26, 29, 31 and 35 of Act No. 571 of the General Acts of the General Assembly of the State of Arkansas, for the year 1919, approved April 1, 1919, hereinbefore referred to, be and the same are hereby repealed.